IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER No. 609 of 2006

Mohan Namdev Khatal .. Appellant

versus

Jeejabai Devaba Kale .. Respondent

...

Mr.S.P. Thorat for the appellant.

Mr.Nitin Vhatkar i/b G. Hiranandani for the respondent.

CORAM : D.G. KARNIK, J

DATED : 29thNovember 2006

P.C.:

1. Heard counsel for the parties. By consent, the appeal is heard finally at the stage of admission itself.

2. This appeal filed under Order 43 Rule 1(U) of the Code of Civil Procedure is directed against the order of remand passed by the learned Addl. District Judge,

Sangli remanding he suit of the appellant for fresh trial after framing one additional issue amongst others as directed by the lower appellate court.

3. The appellant filed a suit bearing Regular Civil Suit no.225 of 1997 against the respondent for a declaration that she was not legally wedded wife of the appellant and the alleged marriage between them was void and invalid in law. The respondent is cousin (daughter of the maternal uncle) of the appellant. According to the appellant, he was abducted in the night between 11th and 12th June 1993 by the brothers of the respondent and accomplices and was detained throughout the day on 12th June 1993 to compel him to agree to the marriage with the respondent. Though the appellant did not agree, on the night of 12th June 1993, the brothers of the respondent made a show of the marriage between the appellant and respondent and on 13th June 1993 declared that marriage had taken place between them. The appellant further pleaded that there was no marriage in fact; no ceremonies necessary to constitute a valid marriage had taken place; there was no home and no saptapadi was performed. Thus no marriage had taken place between the appellant and respondent. The appellant further pleaded that the appellant and respondents were cousins and the

parties were within the prohibited degree of relationship and there could be no marriage between them.

4. Respondent contested the suit and denied all allegations made in the plaint. She contended that there was a valid marriage between her and the appellant. She prayed that the appellant’s suit should be dismissed.

5. The parties adduced evidence before the trial court. The trial court, among others framed an issue

> "Does the plaintiff prove that he was abducted by the brothers of the defendant in the night of 11th June 1993?

The trial court did not record any finding on the said issue. It held that the issue was redundant in view of the fact that the appellant had failed to prove that the brothers of the respondent no.1 had compelled the appellant to marry the respondent against his will. Aggrieved appellant filed an appeal before the District Judge, Sangli. The lower appellate court held that the factum of marriage between the appellant and respondent

was proved. He however held that there was no evidence on whether there was any custom of marriage between the cousins. He held that marriage between cousins would not be valid unless there was a custom of usage governing each of the parties to the marriage. As there was no appropriate evidence regarding the satisfaction of condition no.4 of a valid marriage as laid down by section 5 of the Hindu Marriage Act, remand was necessary. Accordingly, the lower appellate court set aside the judgement and order passed by the trial court and remanded the matter back to the trial court for deciding it afresh after framing interalia an issue: "Whether the defendant proves the custom having force of law in the community of the parties permitting the marriage between the children of brothers and sisters." That order is impugned in this appeal.

6. Learned counsel for the appellant submitted that the appellant had specifically pleaded that the appellant was abducted by force on 11th June 1993 and that a show of marriage was made by the brothers of the respondent. He submitted therefore the issue whether appellant was abducted by force, was required to be framed. The appellate court therefore ought to have given a direction to the trial court to frame that issue also while passing

an order of remand. He further submitted where saptapadi is customary then there can be no valid marriage unless saptapadi is completed. The appellant had pleaded in his plaint that there was no saptapadi which was essential customs between the parties. He had pleaded that there was no marriage infact. He submitted that neither the trial court nor the appellate court had framed any issue whether saptapadi was the essential customary rite and ceremony between the parties and whether saptapadi had taken place. He therefore submitted that the appellant court ought to have framed that issue also while remanding the matter back to the trial court.

7. The plaint read as a whole gives an unmistaken impression that the appellant had essentially pleaded that there was no marriage and only a show of marriage was made by the brothers of the respondent. Respondent by her written statement has denied this. Assuming that the ceremonies of marriage were performed, the issue is whether the ceremonies of marriage were performed by force i.e. to say whether the consent of the appellant for undergoing the ceremonies of marriage was obtained by force. It was therefore necessary for the trial court to frame an issue: Whether the consent of the appellant to the marriage was was obtained by force as alleged by him

in the plaint? It was also necessary for the trial court to frame issues viz: Whether there was a marriage infact between the parties? and Whether saptapadi was customary between the parties and whether it was performed? In the circumstances, the order of remand is required to be maintained but with the directions to frame the following additional issues :-

i) Whether the plaintiff proves that there was infact no marriage between the appellant and respondent?

ii) Whether the plaintiff proves that customary rites and ceremonies of marriage governing both the parties include saptapadi?

iii) If the answer to the aforesaid issue is affirmative, whether the plaintiff proves that no saptapadi had taken place?

iv) Whether the defendant proves existence of a custom on usage governing each of the parties to permit the marriage between cousins - i.e. children of brother and sister?

7. For these reasons, appeal is partly allowed.

The order of remand is maintained. The trial court shall among others frame the issues mentioned above and decide the suit on merits.

(D.G. KARNIK, J)